

BOIES, SCHILLER & FLEXNER LLP

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January 8, 2016

FILED VIA ECF

The Honorable Charles Breyer
U.S. District Court for the Northern District of California
450 Golden Gate Avenue
San Francisco, CA 94102

**IN RE: VOLKSWAGEN "CLEAN DIESEL" MARKETING, SALES
PRACTICES, AND PRODUCTS LIABILITY LITIGATION**

MDL No. 2672 CRB (JSC)

Dear Judge Breyer:

I respectfully submit this application for a lead counsel or steering committee position, addressing the criteria specified in Pretrial Order No. 2.

1. *Professional experience in this type of litigation:*

My Firm and I have been appointed to leadership in numerous MDLs, including two concerning the automobile industry: *In re Takata Airbag Products Liability Litigation* (S.D. Fla.) (Economic Damages Track Co-Lead Counsel); *In re General Motors LLC Ignition Switch Litigation* (S.D.N.Y.) (Executive Committee Member).

Other class actions in which we have served as lead or co-lead counsel include: *In re Blue Cross/Blue Shield Antitrust Litigation* (N.D. Ala.) (Co-Lead Counsel); *Starr International v. United States* (Ct. Fed. Claims) (Lead Counsel); *O'Bannon v. NCAA* (N.D. Cal.) (Co-Lead Trial Counsel); *In re Municipal Derivatives Antitrust Litigation* (S.D.N.Y.) (Co-Lead Counsel); *In re Vitamin C Antitrust Litigation* (E.D.N.Y.) (Lead Counsel); *In re Polyurethane Foam Antitrust Litigation* (N.D. Ohio) (Co-Lead Counsel); *Molecular Diagnostics Laboratories v. Hoffmann-La Roche Inc., et al.* (D.D.C.) (Co-Lead Counsel); *In re Auction Houses Antitrust Litigation* (S.D.N.Y.) (Lead Counsel); *In re Vitamins Antitrust Litigation* (D.D.C.) (Co-Lead Counsel).

2. *Judges' names and contact information:*

Honorable Thomas C. Wheeler (202-357-6596): *Starr International v. United States*

Honorable Phyllis J. Hamilton (510-637-1296): *Oracle v. SAP*

Honorable Vaughn R. Walker (Ret.) (415-871-2888): *Perry v. Schwarzenegger*

Honorable Federico A. Moreno (305-523-5110): *In re Takata Airbag Products Liability Litigation*

3. *Willingness and ability to immediately commit to time-consuming litigation:*

I am willing and able to immediately meet the demands of this case. I understand the time and commitment litigation of this nature requires, and I'm prepared to devote all resources necessary – my own, and those of my Firm – to successfully prosecute and resolve this litigation.

4. *Willingness and ability to work cooperatively with other plaintiffs' counsel and defense counsel:*

My record shows I'm committed to working cooperatively with others, and my partners and I have worked successfully in other matters with many of the lawyers and firms seeking leadership roles in this matter.

With respect to the Volkswagen cases, our Firm has already conferred and cooperated with numerous other firms, including Robbins Geller Rudman & Dowd LLP, with whom we have filed joint complaints, and I was selected by the law firms advocating for transfer to the United States District Court for the District of Columbia to address the JPML in New Orleans.

I have met in person with lead counsel for Volkswagen in New York City, and that experience reinforces my expectation we would have a collegial, cooperative and productive relationship if the Court selects me for a leadership role in this case. I have also worked with Ken Feinberg on numerous matters, and similarly expect our relationship in this matter would be cooperative and productive.

Moreover, I was retained by, and worked extensively with, the Department of Justice as Special Trial Counsel for the DOJ's successful antitrust suit against Microsoft. In that case, as well as during my service as Chief Counsel and Staff Director for Senate Committees, and in number matters in private practice, I have collaborated and cooperated with the DOJ. If selected by the Court, I fully anticipate a productive relationship with the DOJ and its lawyers.

5. *Access to resources to prosecute the litigation in a timely manner:*

My Firm includes approximately 250 litigators, many of whom have extensive experience and success in class actions and other large, complex matters. I'm committed to dedicating as many of my talented colleagues to this case as is necessary to ensure a speedy, efficient and successful resolution of the matter. Our Firm also has substantial financial resources, and is fully able to ensure there is adequate funding to achieve these results.

6. *Willingness to serve as lead counsel, a member of a steering committee, or both:*

I'm willing to serve as lead counsel, or as a member of a steering committee.

7. *Category of plaintiffs I seek to represent:*

I seek to represent vehicle owners and lessees.

BOIES, SCHILLER & FLEXNER LLP

8. *Any other considerations that qualify for leadership position:*

Our Firm has extensive experience taking complex cases to trial, including class actions. During the last few years we have tried three major class actions (more than any firm of which I am aware), and I personally was lead counsel in one of the three. My own trial experience in high-profile matters outside of the class action context includes: (1) Special Trial Counsel retained by the Department of Justice in its successful antitrust suit against Microsoft; (2) lead counsel for Oracle in its Northern District of California copyright case against SAP, which resulted in the largest copyright judgment in history; and (3) lead counsel, along with Ted Olson (my opposing counsel in *Bush v. Gore*), in successfully overturning Proposition 8 (*Perry v. Schwarzenegger*, N.D. Cal. August 4, 2010).

Our willingness and ability to take cases to trial – coupled with our considerable experience representing *defendants* in class actions and other complex cases – has greatly aided us in achieving outstanding results for the plaintiff classes we have represented. We have negotiated billions of dollars in class action settlements for plaintiffs over the last decade. Outside of the class action context we obtained a record-breaking \$4 billion recovery for American Express in its antitrust case against Visa and MasterCard.

While this is a case that should be (and almost certainly will be) settled, I respectfully suggest that substantial experience trying class actions and other complex, high-profile cases will aid in achieving an expeditious settlement at an appropriate level.

I appreciate the Court's consideration of this application, and look forward to addressing the Court in person on January 21, 2016.

Sincerely yours,

A handwritten signature in blue ink, reading "David Boies", is written over a horizontal line.

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Attachment 1: Resume of David Boies/Boies, Schiller & Flexner LLP

Attachment 2: Persons/Firms Supporting David Boies/ Boies, Schiller & Flexner LLP

Attachment 1

RESUME OF DAVID BOIES/BOIES, SCHILLER & FLEXNER LLP

Mr. Boies graduated from Yale Law School in 1966 and has over 40 years experience in complex litigation. He has been selected as one of the 100 Most Influential People in the World by *Time Magazine*, Global International Litigator of the Year by *Who's Who Legal* on seven occasions, as well as Litigator of the Year by *The American Lawyer*, Lawyer of the Year by *The National Law Journal*, runner-up Person of the Year by *Time Magazine*, Best Lawyers in America for more than 25 years, and a Star Individual by *Chambers USA*. In 2013, he was named one of the Top 50 Big Law Innovators of the Last 50 Years by *The American Lawyer*. His governmental representation and work on private matters, include:

- Lead Counsel for former Vice-President Al Gore in connection with the litigation relating to the 2000 Presidential election;
- Special Trial Counsel for the United States Department of Justice in its successful antitrust suit against Microsoft;
- Counsel to the Federal Deposit Insurance Corporation in its litigation against Michael Milken and Drexel Burnham Lambert to recover losses for failed savings and loan associations (\$1.4 billion recovery);
- Chief Counsel and Staff Director of the United States Senate Antitrust Subcommittee in 1978, and Chief Counsel and Staff Director of the United States Senate Judiciary Committee in 1979;
- Counsel to American Express in its Antitrust case against Visa and MasterCard in which American Express received a record-breaking \$4 billion recovery;
- Counsel to Oracle in *Oracle v. SAP* (largest copyright judgment in history, \$1.3 billion);
- Co-lead counsel (with Ted Olson) in *Perry v. Schwarzenegger*, overturning Proposition 8.

BSF has extensive knowledge and experience in prosecuting complex litigation, including MDLs and class actions. BSF has demonstrated consistently that its attorneys can, and do, commit the time, effort, expertise, and energy to prosecute complex litigation. BSF has taken on work, and orchestrated and organized efforts, that some thought unconventional and unattainable.

Since its inception, BSF has negotiated record settlements and won substantial verdicts on behalf of class members. In *In re Vitamins Antitrust Litigation* (D.D.C.), BSF, as one of three Co-Lead Counsel, obtained more than \$1 billion in settlements for class plaintiffs. No. 99-197(TFH), 2000 WL 173867 (D.D.C. Mar. 31, 2000). In 2003, BSF, acting as Co-Lead Counsel, took the remaining four defendants to trial and won a \$49.5 million jury verdict for the class, pre-trebling. Nat'l L. J., Aug. 4, 2003, at 13. In 2013, in *In re Vitamin C Antitrust Litigation* (E.D.N.Y.), the firm won a jury verdict in the first antitrust action against Chinese companies for cartel conduct relating to products sold in the United States, winning a \$162 million judgment, and \$33 million from settling defendants. In *In re Auction Houses Antitrust Litigation*

(S.D.N.Y.), in 2000, the firm, as Lead Counsel, negotiated a \$512 million settlement described by an Interim Plaintiffs' Counsel (who the firm had replaced) as "the most outstanding result I have ever heard of in the history of the antitrust laws." No. 00 Civ. 0648 (LAK), 2001 WL 170792, at *6 (S.D.N.Y. Feb. 22, 2001). And as Co-Lead Counsel in *In re Polyurethane Foam Antitrust Litigation*, the firm recently obtained more than \$430 million in settlements for the Class.

Class Action Trials for Plaintiffs

1. ***Starr International Co. v. United States***, Case No.: 11-CV-779, United States Court of Federal Claims; The Honorable Thomas C. Wheeler (2015).
Case Type: Fifth Amendment Taking and Illegal Exaction
Lead Counsel for Plaintiff Class of Shareholders

Result: Bench trial, liability finding for Plaintiff Class
2. ***O'Bannon v. NCAA***, Case No.: 09-CV-3329-CW, United States District Court, Northern District of California; The Honorable Claudia Wilken (2014).
Case Type: Antitrust
Co-Lead Trial Counsel for Plaintiff Class

Result: Bench trial, Injunctive relief for Plaintiff Class
3. ***In re Vitamin C Antitrust Litig.***, Case No.: 1:06-md-01738-BMC-JO, United States District Court, Eastern District of New York; The Honorable James Orenstein (2013).
Case Type: Antitrust
Co-Lead Counsel for the Plaintiff Class

Result: Jury trial, \$162 million judgment for Plaintiff Class
4. ***In re Scrap Metal Antitrust Litig.***, Case No.: 1:02-CV-0844 (KMO), United States District Court, Northern District of Ohio, Eastern Division; The Honorable Kathleen M. O'Malley (2006).
Case Type: Antitrust
Lead Counsel for Direct Purchaser Plaintiff Class

Result: Jury trial, \$34.5 million judgment for Plaintiff Class
5. ***In re Vitamins Antitrust Litig.***, Case No.: 1:99-mc-00197-TFH, United States District Court for the District of Columbia; The Honorable Thomas F. Hogan (2000).

Case Type: Antitrust
Co-Lead Counsel for Plaintiff Class

Result: Jury trial, \$49.5 million jury verdict and over \$1 billion in settlements for Plaintiff Class

Attachment 2

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